Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan

HIGH COURT (MELAKA) — CIVIL SUIT NO 23-15-1992
SURIYADI J
2 JULY 1997

Tort *— Breach of statutory duty — Duty of highway authority to ensure safety of the highway — Highway Authority Malaysia (Incorporation) Act 1980 s 11(1), Road Transport Act 1987 s 88*

Tort *— Negligence — Highway — Breach in fencing system — Cow gained access through broken fence and strayed on to the highway resulting in a collision with the deceased's car — Duty of care of the highway authority to maintain a safe road*

Tort *— Negligence — Res ipsa loquitur — Road accident — Doctrine not applicable where cause of accident was known*

Tort *— Negligence — Independent contractor — Whether employer liable for fault of its independent contractor*

Tort *— Nuisance — Cow gained access through broken fence and strayed on to the road resulting in a collision with the deceased's car — Whether defendant knew or could be said to presume to know that at the relevant time, a breach of the fence had occurred, or a cow was strolling on the highway*

Contract *— Formation — A contract is formed between the highway authority and the plaintiff the moment a ticket is extracted at the toll gate and the highway is used, making the plaintiff a lawful user of the road*

Contract *— Terms — Implied terms — Contract between highway authority and road user —Implied term or warranty that the highway will be safe for use by road user — Failure by highway authority to use requisite amount of care to ensure safety of road user pursuant to the contract — Whether the implied warranty was breached*

The plaintiffs were passengers in a motorcar driven by the deceased which was travelling through the north bound lane towards Ayer Keroh at the time of the accident. The deceased died on the spot after hitting a stray cow which had found its way to the highway through a breach in the fencing system. The defendant was the highway authority responsible for the construction, maintenance, management and safety of the North-South Highway. The plaintiffs' claim was for breach of duty of care on the part of the defendant as against the plaintiffs who were users of the highway. The plaintiffs based their claim against the defendant on the following grounds: (i) breach of contract; (ii) breach of a statutory duty; (iii) common law negligence; and (iv) nuisance.

Held, allowing the plaintiffs' claim:

(1) Eventhough the defendant had subcontracted to PROPEL — an independent contractor — much of the surveillance, responsibilities, repair works and supervising the comfort and

safety of road users, it could not escape liability as it was still liable for the fault of its independent contractor (see p 496F); *Penny v The Wimbledon Urban District Council & Anor* [1899] 2 QB 72; *Holliday v National Telephone Co* [1899] 2 QB 392; *Jones & Ors v The Victoria Graving Dock Co* (1876–77) 2 QBD 314; *Barraclough v Brown & Ors* [1897] AC 615 and *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834 followed.

(2) The moment a ticket is extracted at the toll gate — as in this case — and the highway is used, a contract is thus struck between the parties, making the plaintiff a lawful user of the road. Built into the contract is the implied term or warranty that the said highway will be safe for use by the deceased and his passengers. As the defendant failed to use the requisite amount of care to ensure the safety of the deceased and the plaintiffs pursuant to the contract, by virtue of the careless behaviour of the defendant, the implied warranty was breached (see pp 500F, H and 501F); *Bromley v Mercer* [1922] 2 KB 126; *Cox v Coulson* [1916] 2 KB 177 and *Mac Lenan v Segar* [1917] 2 KB 325 followed.

(3) Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. In the present case, inspite of the knowledge that that area had experienced broken fences where animals had escaped and strayed on to the road and being aware of the potential dangers, the defendant had not found it fit either to take extra measures or give special attention to that spot to alleviate any disaster.

On the issue of foreseeability, any reasonable man certainly will anticipate that cars will be driven at some speed when using the highway and if any cow (with the foreknowledge that cows do grass around that area) were to stray on the highway, not only is it foreseeable that a collision will occur, but injury or death is the near certain outcome. With the available facts, it would have been impossible to deny the defendant's negligence.

Further, to accede to the submission of the defendant that the plaintiffs should have instead sued the owner of the cow would tantamount to exonerating the defendant of all its liabilities and duty of care towards any road user (see pp 497A, E, I; 498A, G and 500A, B).

(4) Statutory duty involves the notion of taking care not to injure and actions for breach of statutory duty come within the category of negligence. In the present case, the plaintiffs had proven their case against the defendant for breach of statutory duty (see p 498E); *Lochgelly Iron & Coal Co Ltd v M'mullan* [1934] AC 1 and *East Suffolk River Catchment Board v Kent & Anor* [1941] AC 74 followed.

(5) There is sufficient authority to say that if a person's right of free passage or of some rights connected therewith has been the subject of interference, he is endowed with the right to take up a nuisance action. In the present case, the plaintiffs had relied on the doctrine of res ipsa loquitur to highlight the interference. However, the doctrine of res ipsa loquitur was inappropriate as there was evidence to indicate why or how the incident occurred. By being able to determine how or why the incident happened, the approach of the plaintiffs to apply the doctrine of res ipsa loquitur was unacceptable.

Further, the court had to identify the nuisance which the defendant knew or is presumed to know. Based on the evidence, it could not be said for certain that the defendant knew or could be said to presume to know that at the relevant time, a breach of the fence had occurred, or a cow was strolling on the highway. For that matter, it would be highly improbable for the court to make a finding of fact that the defendant could be said to continue the nuisance, when the foreknowledge was not conclusive, let alone end it by some reasonable means. On that score, the issue of foreseeability could not even be considered. The plaintiffs therefore had not been successful under the alternative sub-heading of nuisance as against the defendant (see pp 501I, 502A, D, F and 503B–C).

[Bahasa Malaysia summary

Plaintif-plaintif adalah penumpang sebuah kereta yang dipandu oleh si mati yang sedang dalam perjalanan melalui lorong arah ke utara menuju ke Ayer Keroh pada masa kemalangan. Si mati meninggal dunia di tempat kejadian selepas melanggar seekor lembu yang terlepas dan berada di lebuhraya itu melalui sistem pemagaran yang berlubang. Defendan merupakan pihak berkuasa lebuhraya yang bertanggungjawab bagi pembinaan, penyelenggaraan, pengurusan dan keselamatan Lebuhraya Utara-Selatan. Tuntutan plaintif-plaintif adalah untuk pelanggaran kewajipan berjaga-jaga atas pihak defendan terhadap plaintif-plaintif yang merupakan pengguna lebuhraya. Plaintif-plaintif mendasarkan tuntutan mereka terhadap defendan atas alasan-alasan berikut: (i) pelanggaran kontrak; (ii) pelanggaran kewajipan statutori; (iii) kecuaian common law; dan (iv) kacau-ganggu.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Walaupun defendan telah memberikan subkontrak kepada PROPEL — satu kontraktor bebas — kebanyakan daripada pengawasan, tanggungjawab, kerja-kerja pembaikan dan penyeliaan keselesaan dan keselamatan pengguna-pengguna jalanraya, ia tidak boleh lepas daripada liabiliti kerana ia masih bertanggungjawab bagi kesalahan subkontraktor bebasnya (lihat ms 496F); *Penny v The Wimbledon Urban District Council & Anor*

A [1899] 2 QB 72; *Holliday v National Telephone Co* [1899] 2 QB 392; *Jones & Ors v The Victoria Graving Dock Co* (1876–77) 2 QBD 314; *Barraclough v Brown & Ors* [1897] AC 615 dan *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834 diikut.

(2) Sebaik sahaja tiket dikeluarkan di palang tol — seperti dalam kes
B ini — dan lebuhraya digunakan, satu kontrak diwujudkan di antara pihak-pihak, menjadikan plaintif pengguna jalanraya yang sah. Terdapat dalam kontrak ini satu terma atau waranti tersirat bahawa lebuhraya tersebut adalah selamat untuk digunakan oleh si mati dan penumpang-penumpangnya. Oleh kerana defendan gagal untuk menggunakan langkah berjaga-jaga yang mencukupi
C untuk memastikan keselamatan si mati dan plaintif-plaintif mengikut kontrak itu, memandangkan sikap cuai defendan, waranti tersirat itu dimungkiri (lihat ms 500F, H dan 501F); *Bromley v Mercer* [1922] 2 KB 126; *Cox v Coulson* [1916] 2 KB 177 dan *Mac Lenan v Segar* [1917] 2 KB 325 diikut.

D (3) Kecuaian adalah peninggalan membuat sesuatu yang mana seorang yang munasabah, dengan panduan pertimbangan-pertimbangan yang biasanya mengawal hal-ehwal manusia, akan buat atau membuat sesuatu yang mana seorang yang berhati-hati dan munasabah tidak akan buat. Dalam kes ini, walaupun
E mengetahui bahawa kawasan itu telah mengalami pagar yang pecah di mana binatang-binatang telah terlepas dan berkeliaran di jalanraya dan sedar tentang bahaya yang mungkin berlaku, defendan tidak mendapatinya wajar sama ada untuk mengambil langkah-langkah tambahan atau memberikan perhatian khas terhadap kawasan itu untuk mengurangkan bencana.

F Atas isu kebolehramalan, mana-mana orang yang munasabah tentunya akan menjangka bahawa kereta akan dipandu agak laju apabila menggunakan lebuhraya dan jika lembu (dengan pengetahuan lebih dahulu bahawa lembu-lembu memang meragut rumput di kawasan itu) terlepas ke lebuhraya, bukan sahaja
G boleh diramal bahawa pelanggaran akan berlaku, tetapi kecederaan atau kematian adalah hasil yang hampir pasti. Dengan fakta-fakta yang ada, adalah mustahil untuk menafikan kecuaian defendan.

Selanjutnya, untuk menerima penghujahan defendan bahawa
H plaintif-plaintif sepatutnya menyaman tuan punya lembu itu samalah seperti melepaskan defendan daripada kesemua liabiliti dan kewajipan berjaga-jaga terhadap mana-mana pengguna jalanraya (lihat ms 497A, E, I; 498A, G dan 500A, B).

(4) Kewajipan statutori melibatkan tanggapan menjaga untuk tidak
I mencederakan dan tindakan-tindakan untuk pelanggaran kewajipan statutori termasuk dalam kategori kecuaian. Dalam kes ini, plaintif-plaintif telah membuktikan kes mereka terhadap defendan bagi pelanggaran kewajipan statutori (lihat ms 498E); *Lochgelly Iron & Coal Co Ltd v M'mullan* [1934] AC 1 dan *East*

Suffolk River Catchment Board v Kent & Anor [1941] AC 74 diikut. A

(5) Terdapat autoriti yang mencukupi untuk menyatakan bahawa jika hak seseorang untuk laluan bebas atau beberapa hak lain yang berkaitan dengannya telah ditaklukkan dengan gangguan, dia mempunyai hak untuk mengambil tindakan kacau-ganggu. B Dalam kes ini, plaintif-plaintif telah bergantung kepada doktrin res ipsa loquitur untuk menunjukkan gangguan. Bagaimanapun, doktrin res ipsa loquitur adalah tidak sesuai kerana terdapat bukti untuk menunjukkan mengapa atau bagaimana peristiwa itu berlaku. Dengan kebolehan untuk menentukan bagaimana atau mengapa peristiwa itu berlaku, pendekatan plaintif-plaintif C untuk memakai doktrin res ipsa loquitur tidak boleh diterima.

Selanjutnya, mahkamah harus menentukan kacau-ganggu yang mana defendan tahu atau dianggap tahu. Berdasarkan keterangan, tidak boleh dikatakan dengan pasti bahawa defendan tahu atau boleh dikatakan untuk dianggap tahu bahawa pada masa relevan, D pemecahan pagar telah terjadi, atau seekor lembu sedang berjalan di lebuhraya itu. Begitu juga, adalah tidak mungkin bagi mahkamah untuk membuat pendapat fakta bahawa defendan boleh dikatakan meneruskan kacau-ganggu itu, apabila pengetahuan terlebih dahulu tidak konklusif, apa lagi E menghentikannya dengan cara yang munasabah. Tentang hal itu, isu kebolehramalan tidak boleh dipertimbangkan langsung. Oleh itu, plaintif-plaintif tidak berjaya di bawah tajuk alternatif kacau-ganggu terhadap defendan (lihat ms 501I, 502A, D, F dan 503B–C).]

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Notes

For cases on negligence, see 2 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 315–852.

For cases on nuisance, see 2 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 853–883. G

For cases on breach of statutory duty, see 2 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 18–44.

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600.

For cases on implied terms, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2218–2241. H

Cases referred to

Barraclough v Brown & Ors [1897] AC 615 (folld)
Blyth v Birmingham Waterworks Co (1856) 11 Exch 781 (refd)
Brock v Richards [1951] 1 KB 529 (refd) I
Bromley v Mercer [1922] 2 KB 126 (folld)
Chan Loo Khee v Lai Siew San & Ors [1971] 1 MLJ 253 (refd)
Cox v Coulson [1916] 2 KB 177 (folld)
East Suffolk River Catchment Board v Kent & Anor [1941] AC 74 (folld)

Farr v Butters Bros & Co [1932] 2 KB 606 (refd)
Fitzgerald v ED & AD Cooke Bourne (Farms) Ltd & Anor [1964] 1 QB 249 (refd)
Gayler & Pope Ltd v B Davies & Son Ltd [1924] 2 KB 75 (refd)
Heath's Garage Ltd v Hodges [1916] 2 KB 370 (refd)
Holliday v National Telephone Co [1899] 2 QB 392 (folld)
Howard & Wife v Walker & Ors [1947] 2 All ER 197 (refd)
Hughes v Williams [1943] KB 574 (refd)
Jones & Ors v The Victoria Graving Dock Co (1876–77) 2 QBD 314 (folld)
Lambert v Corp of Lowestoft [1901] 1 QB 590 (refd)
Lathall v A Joyce & Sons & Ors [1939] 3 All ER 854 (refd)
Leanse v Egerton (Lord) [1943] 1 KB 323 (refd)
Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109 (refd)
Lochgelly Iron & Coal Co Ltd v M'mullan [1934] AC 1 (folld)
Longhurst v Metropolitan Water Board [1948] 2 All ER 834 (folld)
Mac Lenan v Segar [1917] 2 KB 325 (folld)
Morley v Dubinsky (1966) 59 DLR (2d) 217 (refd)
Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty & Anor [1967] 1 AC 617 (refd)
Papworth v Mayor & C of Battersea (No 2) [1916] 1 KB 583 (refd)
Penny v The Wimbledon Urban District Council & Anor [1899] 2 QB 72 (folld)
Potts or Riddell v Reid [1943] AC 1 (refd)
Searle v WallBank [1947] AC 341 (refd)
Sedleigh-Denfield v O'Callaghan & Ors [1940] AC 880 (refd)
Thomson v Knights [1947] KB 336 (refd)
Wringe v Cohen [1940] 1 KB 229 (refd)

Legislation referred to

Highway Authority Malaysia (Incorporation) Act 1980 s 11(1)
Road Transport Act 1987 s 88

Etican Ramasamy (*E Ramasamy & Co*) for the plaintiffs.
Ashok K Raman (*Abu Talib Shahrom & Zahari*) for the defendant.

Cur Adv Vult

Suriyadi J: The first plaintiff, the wife of Sellapans a/l Ramasamy ('the deceased') and the second, third, fourth and fifth plaintiffs were passengers in a motorcar No BCC 2412, driven by the deceased on 6 November 1991 at about 8pm. The car had entered the highway through the Pagoh toll gate and was travelling through the north bound lane towards Ayer Keroh at the time of the accident. The deceased died on the spot after hitting a cow which had strayed on to the north bound North-South Highway at km 138.5. The second and the third plaintiffs are minors and are suing through their mother, the first plaintiff. The fifth plaintiff is also a minor, and is suing through his father, the sixth plaintiff. The fourth plaintiff is

the mother of the first plaintiff. The defendant is the highway authority responsible for the construction, maintenance, management and safety of the North-South Highway.

The suit originally included the Menteri Pengangkutan Malaysia, Kementerian Pengangkutan Malaysia and Kerajaan Malaysia as the second and third defendants respectively. Midway through the trial, the plaintiffs dropped the claims against the two defendants on the basis that by virtue of a Novation Agreement and Concession Agreement between the first defendant and the other two defendants, all duties and liabilities both under common law and statute had devolved upon the former (see ID 32 and 33).

Perusing the statement of claim especially from paras 9 onwards, the plaintiffs' claim is for a breach of duty of care on the part of the defendant as against the plaintiffs who were users of the highway. Four sub-heads can be construed from the statement of claim namely that of a breach of contract and/or warranty and/or licence, nuisance, common law negligence and a breach of statutory duty as the basis of the plaintiffs' claims.

The cause of death

Before broaching the legal issues, I propose to come to a finding of facts as to how that unfortunate incident happened. It is therefore encumbent and necessary for me to sieve and scrutinize the evidence thoroughly as parties have found it very difficult to come to any agreement on the facts and on the issue of liability. The available evidence adduced by the police are themselves not exactly of the highest quality and are at times confusing. The plaintiffs called four witnesses namely PW1, a Chief Inspector of Police who acted as the investigating officer on the night of the incident, PW2 the wife of the deceased who sat on the front left passenger seat, PW3 the mother of the first plaintiff who sat at the rear right hand side of the car and PW4 a press photographer, who contributed photographs of the scene on that fateful night. The defendant called DW1, an employee of PLUS since 1988 who was present at the scene of the accident that night, DW2 an employee of PROPEL who was also at the scene, and lastly DW3 who used to work with PLUS.

DW1 during the early part of the examination-in-chief made the statement that the fence could be breached as the people who stayed on the adjoining land had previously committed vandalism on the fence. The breach was used as an access point for them. He admitted during the trial that cows and buffaloes do pose a danger to users with many accidents involving cows in 1991 and 1992. DW2 during the cross-examination admitted that he did not know how the dead cow made its way to the road. DW3 similarly did not investigate as to how it succeeded in straying on to the highway. In fact, he neither returned to the relevant scene again nor made any repairs of any breaches in the fencing system.

At the onset, I must say that PW1, the investigating officer of the accident who had carried out his duties very unconvincingly, aside from producing a bad sketch plan of the area, had also obtained photographs of

poor quality. Regardless of the wanting quality of those neutral evidence, he did convince me that the shattered glass came from the deceased's car. He confirmed that there was another car presumably involved with that incident but with the windscreen still intact. He saw a dead cow in the middle of the road and was convinced that BCC 2412 had collided into it resulting in the car careening to the left and eventually landing at some bushy area. In his opinion, it was improbable that any other cars could have knocked down that luckless cow.

PW2 the wife of the deceased was more graphic in her description of the accident when she alleged that on the night of the accident, whilst sitting on the left side of the car, she saw a buffalo or a cow coming suddenly from her left and straying on to the car's path. Due to the suddenness of the incident and the proximity of the animal the collision was unavoidable. She confirmed the view of PW1 that the loss of control over the car occurred after the collision and not after knocking into a tree. She lost consciousness after collision.

PW3, the mother of PW2 who also travelled as a passenger in the car on that unfortunate night, sat at the rear side of the car. She corroborated PW2's evidence when she confirmed that while travelling on the highway, a cow crossed the road from left to right resulting in an inevitable collision. She too confirmed that due to the proximity of the cow, evasive action was not possible.

PW4 who is a journalist on the relevant date went to the scene of the accident of km 138.5 after receiving information from a source. He successfully took some photographs albeit at a distance and tendered them as 35A-D.

From the above evidence, I am satisfied that on the night in question Sellapans a/l Ramasamy who was driving vehicle BCC 2412 at km 138.5 had collided with a stray cow that was moving from the left side of the road to the right. Due to the proximity of that animal, the deceased who was left with no room to take evasive action lost his life. The plaintiffs who were passengers suffered injuries.

Who has responsibility over the highway

Before proceeding to the legal issues regarding the sub-headings over which the plaintiffs are relying on, perhaps it will be in order if I were to refer to the Highway Authority Malaysia (Incorporation) Act 1980 now. The introductory words of this Act reads that it is an Act to establish the Highway Authority Malaysia to supervise and execute the design, construction, regulation, operation and maintenance of inter-urban highways, to impose and collect tolls, *to enter into contracts and to provide for matters connected therewith.* For purposes of our case, s 11(1) is relevant and it reads:

> 11 (1) The functions of the Authority are —
> (a) to supervise and execute the design, construction and maintenance of highways as determined by the Federal Government;

(b) to supervise and execute the design, construction and maintenance of rest and service areas and other facilities that may be deemed necessary along highways as determined by the Federal Government;
(c) to collect toll from the users of highways and other dues from facilities along highways;
(d) to plan and carry out research to ensure efficient utilisation of highways and other facilities along highways; and
(e) generally to do everything for the betterment and proper use of highways and other facilities along highways.

Aside from carrying out the above statutory functions, the Highway Authority is not relieved of the responsibilities and rules which a Minister may prescribe under s 88 of the Road Transport Act 1987 (Act 333) (especially para (k) for purposes of this case, ie prohibiting animals from being on or being left unattended or not under due control on roads or any particular class of roads or on any particular road). The rules envisaged under s 88 is generally for the purpose of regulating traffic on roads, relieving congestion and to facilitate the providing of rules and procedures to ensure the safety of road users.

By virtue of a Novation Agreement dated 20 July 1988 made between the Government of Malaysia, United Engineers (M) Bhd and Projek Lebuhraya Utara-Selatan Bhd (PLUS), the Government of Malaysia granted United Engineers the exclusive right and authority to undertake to enjoy the concession provided under a Concession Agreement dated 18 March 1988. Pursuant to the provisions built into this Novation Agreement, with the consent of the government, United Engineers had assigned and transferred its liabilities and obligations to PLUS. In the process, it is evident that the defendant has subcontracted to PROPEL, and independent contractor, much of the surveillance responsibilities, repair works and supervising the comfort and safety of road users. Despite this act, the defendant cannot escape liability as it is still liable for the fault of its independent contractor (see *Penny v The Wimbledon Urban District Council & Anor* [1899] 2 QB 72; *Holliday v National Telephone Co* [1899] 2 QB 392; *Jones & Ors v The Victoria Graving Dock Co* (1876–77) 2 QBD 314; *Barraclough v Brown & Ors* [1897] AC 615; and *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834).

Is there a cause of action against the defendant?

As to whether a cause of action can arise for the plaintiffs on mere negligence without more, it is common knowledge among lawyers that mere negligence in itself is not a cause of action. To give a cause of action there must be negligence which amounts to a breach of duty towards the person claiming (*Farr v Butters Bros & Co* [1932] 2 KB 606). In the absence of scienter no liability will be placed on the shoulders of the defendant inspite of the loss and damages caused by the accident (*Lathall v A Joyce & Son & Ors* [1939] 3 All ER 854; *Papworth v Mayor & C of Battersea (No 2)* [1916] 1 KB 583; *Lambert v Corp Of Lowestoft* [1901] 1 QB 590; and *Leanse v Egerton (Lord)* [1943] 1 KB 323).

A But what is negligence? Suffice for me to say that *negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do* (*Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781). Lord Porter on the requirement of negligence for any case in *Potts or Riddell v Reid* [1943] AC 1 at p 31 said:

> Negligence is the failure to use the requisite amount of care required by the law in a case where a duty to use care exists.

It is trite law too that to succeed in this cause of action, this event must not only be foreseeable but also likely to cause injury 'to the neighbour', or road user, in this case. Gill FJ in *Chan Loo Khee v Lai Siew San & Ors* [1971] 1 MLJ 253 at p 258 succinctly observed that:

> It would seem clear from the authorities that the duty to take care hinges on the foreseeability of the event which is called into question and the likelihood of such an event causing injury to one's neighbour as defined by Lord Atkin in *Donoghue v Stevenson*, and that the test as to the degree or standard of care is always objective. This means that if in the eyes of the hypothetical reasonable man of ordinary intelligence and experience a motor accident is the foreseeable result of the act or omission of, and it is likely to injure some one who is so closely or directly affected by the act or omission that he ought reasonably to be in contemplation as being so affected, then the person responsible for the act or omission is liable in damages for negligence.

Any reasonable man certainly will anticipate that cars will be driven at some speed when using the highway, and no amount of superhuman ability will save the drivers when confronted with dangers that require distance and time if any effective evasive action is to be undertaken. It will not be assuming too much if I opine that no driver will expect an animal, let alone a huge cow to cross his path on a sophisticated highway run by an established company. On the same breath, it is not unreasonable for a driver to expect animals to stray cross his path if he were to drive, say along the old Melaka/Alor Gajah route; in fact not experiencing an animal crossing the road at any one time would be a rarity and an exception.

As to whether there is a duty on the part of the driver to be on the lookout for man or animals to dart across his path in a main highway, Raja Azlan Shah FJ (as he then was) in the case of *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109 especially at p 119 said:

> The law is content to take the cavalier view that a driver of a motorcar travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner.

An offshoot of this view will be that, if a driver is under no duty or obligation to look out for anybody darting across at a main highway, similarly, it is improbable that any duty exist on the driver as regards animals especially on the North-South Highway. To regurgitate, if any cow (with the foreknowledge that cows do grass around that area) were to stray on the highway, not only is it foreseeable that a collision will occur,

but injury or death is the near certain outcome. It does not need a car to be driven at 110kph or above to result in death. As in this case, eventhough the deceased was only driving at 80kph — as asserted by PW2 — in a 110 kph speed limit zone, the outcome was still catastrophic.

By virtue of the fact that this suit is statute based, the case of *Lochgelly Iron & Coal Co Ltd v M'mullan* [1934] AC 1 is relevant, in particular the remarks of Lord Wright, when he said (at p 23):

> ... the cause of action is complete on proof of breach of the statutory duty, ... In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute. But the duty is the same in kind in this respect, that it is a duty to take precautions and care ... ; it is a duty to take care which is owed ... , and which if broken constitutes negligent conduct, for which, if damage ensues ... , damages are recoverable. Hence the breach of such a duty as that in question has been, I think, correctly described as statutory negligence.

Lord Atkin in *East Suffolk Rivers Catchment Board v Kent & Anor* [1941] AC 74 at p 88 said:

> As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence.

Further at p 90 he said:

> I treat it therefore as established that a public authority, whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or, as it is put in some of the cases, must not do it carelessly or improperly.

It is my finding of fact that that area has experienced broken fences where animals have escaped and strayed on to the road. Inspite of that knowledge and being aware of the potential dangers, the defendant had not found it fit either to take extra measures or give special attention to that spot to alleviate any disaster. This inaction is perhaps founded on the belief, as asserted by DW1, that the responsibility of preventing animals from straying on to the highway lay on the shoulders of the occupants of the adjoining land. The unfortunate death of the driver of this case which left the children fatherless and with a possible legacy of a bleak future is the disastrous outcome of a misconceived belief and attitude.

It is perhaps not too presumptuous for the court to conclude that it is due to this attitude that no serious or extra precaution was accorded to that area to ensure a breachproof system. It was only after 1991 that barbed wires were placed around that area; even that too was for the purpose of preventing trespassers from entering the highway. By some strange deduction, the dangers of animals to road users never seemed to loom large in the agenda of the defendant! From these facts, I must assume that on that material day, the fence was breached again, and as

A there was no barbed wires or other obstacles placed there, that dead cow had found its way to the highway through that gap. Had the barbed wires been placed there earlier, the debacle could have been prevented. For that matter, the locals from the adjoining land would have been dissuaded from breaching the fencing system, merely to create a short cut, by the very sight
B of the intimidating barbed wires.

Due to the stance of DW1, it is only proper that I make some comments pertaining to this issue, ie whether the plaintiff should have sued the owner of the cow and to exonerate the defendant. In *Gayler & Pope Ltd v B Davies & Son Ltd* [1924] 2 KB 75, it was held that the
C unexplained trespass of an animal from the adjoining land on to the highway was prima facie evidence. Whether animals escaping from adjoining premises will give rise to an action if there is negligence sometimes is not very clear (*Brock v Richards* [1951] 1 KB 529; *Hughes v Williams* [1943] KB 574 at p 576; *Thomson v Knignts* [1947] KB 336 at p 341 and *Fitzgerald v ED & AD Cooke Bourne (Farms) Ltd & Anor* [1964] 1 QB
D 249). *Salmond On Torts* (16th Ed) at p 281 after referring to *Wringe v Cohen* [1940] 1 KB 229 wrote:

> The occupier is liable, of course, for acts of positive misfeasance whereby he obstructs the highway or renders it dangerous, and he is also liable for maintaining his adjoining premises in such a dangerous condition as to
E constitute a nuisance to the highway.

In the case of *Searle v WallBank* [1947] AC 341, the court did not view that the owner was outright negligent if an animal escaped unless he accompanied the animal and damages occur after the animal had escaped. In other words, certain special circumstances will have to exist before an
F owner is to be held responsible.

Going by these cases, it would appear that for the owner of the cow to be responsible, the owner must have committed acts of positive misfeasance. Here, we do not even know the owner of the cow, let alone the person who breached the fence, which resulted in the cow having
G access to the highway. For all we know the culprit who breached the fence may not be the owner of the cow, with him having absolutely no idea of the existence of that breach. Even if the blameless owner can be identified, his only fault may only be to own an active cow which by its very nature has a propensity to be very mobile. In the case of *Heath's Garage Ltd v Hodges* [1916] 2 KB 370, the court held that an owner or occupier of land
H adjoining an ordinary highway was not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway. According to the court, it will be a very sad day when farmers become liable to unlimited liability in case of inadvertently or even wilfully permitting their cattle to trespass on the highway. As against this, we have the defendant who has
I undertaken to ensure the safety of the highway, and who will be paid for that promise when a contract was sealed the moment the deceased accepted the ticket at the toll gate. As far as the deceased was concerned, he made a pact with the defendant in that the latter was to provide not only safety to him and his family but also an unhindered drive all the way to his

destination. To accede to the submission of the defendant that the plaintiff should have instead sued the owner of the cow would tantamount to exonerating the defendant of all his liabilities and duty of care towards any road user. To use the colloquial term, it is as good as allowing him to push the bucket to a third party.

With the available facts, it would have been impossible for me to deny the defendant's negligence. Eventhough the defendant's inaction was not based on the desire to produce the accident, yet it actually produced that unwanton result by virtue of the administrative carelessness or indifference to the lurking dangers eventhough without design. I view this lackadaisical attitude unacceptable in the light of the previous acquired knowledge that this was a troublesome spot. The area too was still left unlit without any extra precaution taken to ensure that no untoward incident occurred.

Contract

On the sub-basis of contract which the plaintiffs have asserted in the statement of claim, the views of *Charlesworth & Percy on Negligence* (9th Ed) at p 12 are relevant. Here the writer opined:

> A duty to take care can be imposed by law or can be created by contract or trust. The breach of the contractual duty to take care, however, is not negligence in the sense in which the word is now being used. It is not uncommon to speak of the negligent performance of a contract but that in that case, the word 'negligent' is used in the second meaning explained above, ie in the sense of careless ... *but it is now well recognized that breach of a contractual duty must be dealt with according to the law of contract, and cannot be regarded as a tort of negligence.* (Emphasis added.)

It is my understanding of the law that the moment a ticket is extracted at the toll gate, as in this case, and the highway is used, a contract is thus struck between the parties, making the plaintiff a lawful user of the road (*Bromley v Mercer* [1922] 2 KB 126). Undoubtedly, if the driver sustains injuries due to his own negligence, no amount of persuasion will convince the court to hold the defendant liable. On the other hand, if the latter has been careless in its duty to keep up to its bargain to maintain a good and safe road, barring unforeseen circumstances, eg acts of God, then the defendant cannot escape that responsibility and may be held liable. I am in total agreement with the submission of the learned counsel of the plaintiffs that built into the contract is the implied term or warranty that the said highway will be safe for use by the deceased and his passengers. There will be an expectation that:

(1) the plaintiffs' usage of the highway will be without any hindrance, obstruction and without risking any bodily injury or damage to the car;

(2) an effective fencing system will be erected to ensure that animals will be prevented from straying onto the highway;

(3) in the event the fencing system is breached, repairs will be carried out promptly before any untoward incidents occur;

(4) sufficient warning is given to road users of any impending danger on the highway; and

(5) generally to ensure that an effective system of control management have been set up to ensure that the safety of road users are guaranteed.

In the case of *Cox v Coulson* [1916] 2 KB 177, the plaintiff went to see a performance in a theatre, and during the show an actor fired a pistol which by some unexplained reasons fired a live bullet instead of a blank. The plaintiff was injured. He sued the defendant who was the lessee and manager of that theatre. Swinfen Eady LJ at p 181 said:

> If the defendant is under any liability *it must arise out of the contract* which was made when, having held out by means of the playbill an invitation to his theatre, he issued a ticket to the plaintiff and received her 9d ... .
>
> ... The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis v Cockrell* LR 5 QB 184; *Norman v Great Western Ry Co* [1915] 1 KB 584. (Emphasis added.)

In *MacLenan v Segar* [1917] 2 KB 325 especially at pp 332–333, McCardie J said:

> Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them.

To avoid any risk of repetition I will merely say that the above findings of fact is applicable under this sub-heading. As the defendant failed to use the requisite amount of care to ensure the safety of the deceased and the plaintiffs, pursuant to the contract, I am satisfied by virtue of the careless behaviour of the defendant that the implied warranty was breached.

Nuisance

Nuisance is a term used to cover a wide variety of tortuous acts or omissions and may not be capable of any legal definition as its definition will depend on the surrounding circumstances. What is trite is that negligence is not an essential element in determining liability for nuisance although fault of some kind is almost always necessary; fault generally involves foreseeability (*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty & Anor* [1967] AC 617).

There is sufficient authority to say that if a person's right of free passage or of some rights connected therewith has been the subject of interference, he is endowed with the right to take up a nuisance action (see *Howard & Wife v Walker & Ors* [1947] 2 All ER 197 and *Winfield's Textbook on the Law of Tort.*

The plaintiffs' counsel in his submission when highlighting this interference have somewhat relied on the maxim of res ipsa loquitur. *Clerk and Lindsell on Torts* (10th Ed) at p 569 in the course of discussing *Morley v Dubinsky* (1966) 59 DLR (2d) 217 said that the doctrine of res ipsa loquitur in its very nature can only apply to negligence liability. The writer further opined:

> In so far as nuisance rests on negligence, it can apply to nuisance also. The doctrine applies when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied, it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is inappropriate, for the question of the defendant's negligence must be determined on that evidence.

On the basis of the above pre-conditions, I must thus conclude that the doctrine of res ipsa loquitur is inappropriate for the moment as there is evidence to indicate why or how the incident occurred. There is evidence to support the finding that the accident was due to a collision between the deceased's car and a stray cow which had found its way to the highway. That cow had gained access through a breach in the fencing system. This breach as said much earlier, was due to the lackadaisical behaviour of the defendant of not lighting that area, placing barbed wires, having proper surveillance of the area, having trenches or applying any other measures which could have easily prevented those breaches. In simple terms, by being able to determine how or why the incident happened, the approach of the plaintiff to apply the doctrine of *res ipsa loquitur* is unacceptable.

Lord Romer in the case of *Sedleigh-Denfield v O'Callaghan & Ors* [1940] AC 880 at p 913 laid down the proposition that:

> .. But an occupier of land upon which a nuisance has been created by another person is liable if he 'continues' the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question that probably does not admit of a comprehensive answer. But I agree with my noble and learned friend upon the woolsack, whose opinion I have had the privilege of reading, that the occupier 'continues' a nuisance if with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end though with ample time to do so.

In *Leanse v Egerton (Lord)* [1943] 1 KB 323, the plaintiff while walking on the highway was injured by glass falling from a window in an unoccupied house belonging to the defendant. The office of the defendant's agents was shut on Saturday and Sunday, and as it was difficult to obtain labour during the weekend, no steps were taken to remedy the risk to passers-by until the coming Wednesday. The unfortunate incident happened during that span of time. The relevancy of this case vis-a-vis the current case comes across by virtue of the succinct summary made under 'Held' which reads:

A that the defendant had presumed knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had 'continued' it and was liable to the plaintiff.

To wind up my finding under this sub-heading of nuisance, I have to B identify the nuisance which the defendant knew or is presumed to know. Having perused the evidence, I cannot say for certain that the defendant knew or could be said to presume to know that at the relevant time a breach of the fence had occurred, or a cow was strolling on the highway. For that matter, it will be highly improbable for the court to make a finding of fact that the defendant could be said to continue the nuisance, when the C foreknowledge is not conclusive, let alone end it by some reasonable means. On that score, the issue of foreseeability cannot even be considered. I therefore must conclude that the plaintiffs have not been successful under his alternative sub-heading of nuisance as against the defendant.

D *Conclusion*

The plaintiffs have proven their case pursuant to a breach of duty of care as against the defendant under the sub-headings of breach of contract, breach of a statutory duty and breach of common law negligence. I therefore order judgment as prayed.

E As regards damages, parties have agreed on the following quantum based on a 100% liability:

<u>For the first plaintiff</u>			
a) Special damages	..	RM	500
F b) General damages for injuries	..	RM	2,000
c) For funeral expenses	..	RM	2,000
d) For bereavement	..	RM	10,000
<u>For the second plaintiff</u>			
G General damages	..	RM	700
<u>For the third plaintiff</u>	..	Nil	
H <u>For the fourth plaintiff</u>			
a) Special damages	..	RM	250
b) General damages	..	RM	3,750
<u>For the fifth plaintiff</u>			
I General damages	..	RM	2,500
<u>For the sixth plaintiff</u>			
Special damages	..	RM	5,00

For the first, second and third plaintiffs under loss of dependency

a) Pre-trial loss for 65 months .. RM 42,000

b) Post-trial loss for 67 months .. RM 43,000

As to interest, I order an 8%pa interest for general damages from the date of filing of the writ, ie 27 October 1992 until the date of judgment; 4%pa interest for special damages and pre-trial loss of dependency from the date of accident, ie 6 November 1991 until the date of judgment. There shall be an interest of 8%pa on the whole judgment sum from the date of the judgment until the date of full payment. Costs is ordered against the defendant and is to be taxed.

Order accordingly.

Reported by Jamalul Hisham